IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

THURSDAY, THE 5TH JULY 2007 / 14TH ASHADHA 1929

WP(C).No. 15994 of 2007(D)

PETITIONER:

MATHAI JOSEPH, SON OF MATHAI,
PADINJARAYIL HOUSE, PANNOOR PO.,
KARIMANNUR, THODUPUZHA.

BY ADV. SRI.V.G.ARUN
SRI.T.R.HARIKUMAR

RESPONDENTS:

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1. WILSON MATHEW, PADINJARAYIL HOUSE,
KARIMANNUR, THODUPUZHA.

2. PHILOMINA SOBY, DO. DO.

3. SISTER. JEROSE, RESIDING AT F.C.CONVENT,
KARUKADAM, KOTHAMANGALAM.

4. SISTER.ANIEES MATHEW, RESIDING AT
F.C.CONVENT, PROVINCIAL HOUSE,
MOOVATTUPUZHA.

5. MATHAI, PADINJARAYIL HOUSE,
PALLICKAMURI, KARIMANNUR, THODUPUZHA.

6. ELIKUTTY JOSEPH, -DO-

7. GRACY KURIEN, 62-WEST HART FORD
C.T. 061179-USA.

R3 TO 5 BY ADV. SRI.ROY CHACKO

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 05/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONERS EXTS:

EXT.P1: TRUE COPY OF THE PLAINT IN O.S.90/2004 OF THE SUB COURT OF THODUPUZHA DT. 4.11.2004

EXT.P2: -DO- OF THE DEPOSITION OF DW1 DT. 2.1.05 IN O.S.90/04

EXT.P3: -DO- OF THE AFFIDAVIT AND PETITION IN I.A.78/07 DT.31.1.07

EXT.P4: -DO- OF THE OBJECTION FILED BY THE THIRD PLAINTIFF DT.31.1.2007

EXT.P5: -DO- OF THE ORDER IN I.A.78/07 IN O.S.90/04 DT. 12.4.07

jj /true copy/

P.A TO JUDGE

M.N.KRISHNAN, J.

WP(C)No.15994 OF 2007 D

Dated this the 5th July, 2007.

JUDGMENT

This writ petition is filed seeking to set aside the order passed by the Subordinate Judge, Thodupuzha in I.A.78/07 in O.S.90/2004. The petition is one for recalling the fifth defendant who had been examined as D.W.1 and to adduce further evidence. The court below exercised its discretion by allowing the prayer and it is against that decision the present writ petition is filed. Without any reservation it can be said that the fifth defendant is a very important witness in this case. On account of his age (86 years) that the court below permitted him to be examined first even before the plaintiff mounted the box to give evidence. Now it is submitted that there were some material omissions and further evidence has to be let in by examining him. This Court, in the decision reported in **Savithri v. Sreenivasan** {1987(2) KLT 388} held that the intention of the rule is to afford an opportunity to put such questions to a witness as had not been put to him in the earlier examination due to the inadvertence of a party. The courts cannot recall a witness at the instance of a party under this rule to fill up lacuna in the evidence already let in. So the decision

makes it clear that the discretion is wide but it has to be exercised judiciously. Since he is a key witness and if there had been omissions it is necessary to adduce evidence but, at the same time, I make it clear that this re-examination shall not be used for explaining away the evidence given by other witnesses. So the writ petition is disposed of confirming the order of the court below but with a rider that it has to follow the principles laid down in Savithri's case (supra) and further that it shall not allow the witness to do away or explain the evidence tendered by other witness.

M.N.KRISHNAN
Judge

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